



COMMONWEALTH of VIRGINIA

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January 18, 2017

Andrew R. McRoberts, Esquire
Essex County Attorney
1111 East Main Street
Post Office Box 1998
Richmond, Virginia 23218-1998

Dear Mr. McRoberts:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask three questions regarding the interpretation of § 51.1-124.13 of the *Code of Virginia*, which requires the forfeiture of pension, retirement, and related benefits provided under the Virginia Retirement System ("VRS") to public employees convicted of certain felonies:

- 1) Does an employer have discretion under § 51.1-124.13 and Form VRS-180 ("Employer Request for Forfeiture of Member Benefits") to file Form VRS-180 to initiate forfeiture of VRS benefits once it has determined that an employee's felony conviction was associated with the performance of the employee's job duties;
- 2) Does the response to the first question above change based on the language of Form VRS-180, in effect on February 4, 2014, indicating "if an employee is convicted of a felony for misconduct occurring on or after July 1, 2011 and you have determined that the felony was in association with the performance of the employee's job duties, you *may* request the employee forfeit all VRS benefits" (emphasis added); and
- 3) Must an employer which relied on the permissive language of Form VRS-180 (Rev. 12/11) as described above in electing not to seek the forfeiture of employee VRS benefits in 2014 now reconsider the forfeiture of VRS benefits issue?

Applicable Law and Discussion

Title 51.1 of the *Code of Virginia* establishes pension, retirement, and related benefits for various public employees,¹ including benefits for public employees in positions covered under the Virginia

¹ An "employee" includes any "employee of a locality participating in the Retirement System." VA. CODE ANN. § 51.1-124.3 (2013).

Retirement System.² Section 51.1-124.13 of the *Code of Virginia*, enacted in 2011, requires that a person otherwise entitled to VRS benefits under Title 51.1 forfeit those benefits if they are convicted of a felony arising from misconduct that occurred in any position covered under VRS. Specifically, the statute provides in pertinent part that:

No person shall be entitled to any of the benefits of this title as provided in this section if (i) he is convicted of a felony and (ii) the person's employer determines that the felony arose from misconduct occurring on or after July 1, 2011, in any position in which the person was a member covered for retirement purposes under any retirement system administered by the Board.^[3]

Pursuant to the statute, the employer is tasked with determining whether a felony conviction arose from misconduct in a covered position on or after July 1, 2011. Before making such a determination, the employer must provide the employee with "reasonable prior written notice and . . . an opportunity to be heard."⁴ If the employer then makes a determination against the employee, the employee has the right to appeal the determination by submitting a notice to the circuit court within five working days. The employer's determination against the employee becomes "final" after ten days if no appeal is sought, or upon the date of the circuit court's decision if an appeal is sought and the determination is affirmed. Upon the employer notifying the Board of Trustees of VRS (the "Board") of the final determination against the employee, the Board must proceed to implement the forfeiture of benefits "as soon as practicable."⁵

1. No employer discretion to file Form VRS-180.

You ask whether an employer participating in VRS has discretion under § 51.1-124.13 to file Form VRS-180 to initiate forfeiture of VRS benefits once it has determined that an employee's felony conviction arose out of misconduct in a covered position. As noted in a prior opinion of this Office, it "is a 'principal rule of statutory interpretation . . . that courts will give statutory language its plain meaning.'"⁶ Section 51.1-124.13 is clear that "*No person* shall be entitled to any of the benefits of [Title 51.1] . . . if (i) he is convicted of a felony and (ii) the person's employer determines that the felony arose from misconduct occurring on or after July 1, 2011, in any position in which the person was a member covered for retirement purposes under any retirement system administered by the Board."⁷ In addition, the statute goes on to mandate that VRS implement the forfeiture "as soon as practicable after the employer notifies the Board" of the final determination.⁸ Implicit in this directive is a clear requirement that the employer notify VRS once a determination has been made final against the employee.

² For example, Title 51.1 establishes the Virginia Retirement System (§§ 51.1-100 through 51.1-169), the Government Employees Deferred Compensation Plan (§§ 51.1-600 through 51.1-605), and the Cash Match Plan (§§ 51.1-607 through 51.1-613).

³ VA. CODE ANN. § 51.1-124.13(A) (2013).

⁴ *Id.*

⁵ Section 51.1-124.13(C).

⁶ 2015 Op. Va. Att'y Gen. 119, 125 (quoting *Davenport v. Little-Bowser*, 269 Va. 546, 555 (2005)).

⁷ Section 51.1-124.13(A) (emphasis added).

⁸ Section 51.1-124.13(C). The only exception to a forfeiture of benefits is when an employee "is or becomes a member in service after relinquishment of benefits under subsection C, [in which case] he shall be entitled to the benefits under [Title 51.1] based solely on his service occurring after the relinquishment." Section 51.1-124.13(D).

Accordingly, the statute allows for no discretion on the part of the employer once a final determination has been made that the felony arose from misconduct in a VRS-covered position with the employer. In the absence of statutory language creating such discretion, I must conclude from the plain language of the forfeiture statute that an employer is required to notify VRS of any final determination against an employee.

2. Form VRS-180 (Rev. 12/11) conflicts with statutory prohibition.

You next inquire about the effect of language in Form VRS-180 (“Employer Request for Forfeiture of Member Benefits”) (Rev. 12/11), in effect on February 4, 2014, which indicated that “[i]f any employee is convicted of a felony for misconduct occurring on or after July 1, 2011 and you have determined that the felony was in association with the performance of the employee’s job duties, you *may* request the employee forfeit all VRS benefits . . .” (Emphasis added.)

Form VRS-180 (Rev. 12/11) is an administrative guidance document.⁹ Although interpretations of statutes contained in administrative guidance documents are not binding and do not have the force of law, they are entitled to some deference by the courts according to their persuasive effect.¹⁰ No deference, however, is given if the interpretation is inconsistent with the statute. “When an agency’s statutory interpretation conflicts with the language of the statute . . . the usual deference accorded to an agency’s interpretation should be withheld.”¹¹

Form VRS-180 (Rev. 12/11) is inconsistent with § 51.1-124.13 of the *Code of Virginia* to the extent that it suggests the employer has discretion whether to file the form. As the VRS Form interprets the statute in a manner that creates a conflict, it must not be given deference here. I note that a current version of Form VRS-180 (Rev. 12/15) does not contain the discretionary language. Rather, it directs a covered employer to “[c]omplete this form to notify VRS that a member has been convicted of a felony for misconduct associated with the member’s performance of job duties and that all VRS related benefits must be forfeited.”¹² By removing the discretionary language, VRS has expressed its recognition that the mandatory interpretation of § 51.1-124.13 controls.

3. Reconsideration of election not to seek forfeiture of employee VRS benefits based on language of Form VRS-180 is required.

Finally, you ask whether an employer who relied on the permissive language of Form VRS-180 (Rev. 12/11) in electing not to seek the forfeiture of employee VRS benefits in 2014 must now reconsider the forfeiture. As discussed above, § 51.1-124.13 does not grant an employer any discretion to determine whether an employee’s benefits are forfeited. The only determination an employer is permitted to make is deciding whether the felony arose from misconduct in a covered position. Once the employer has provided the person prior written notice and an opportunity to be heard, and the determination becomes final, the employer must notify the VRS Board.

⁹ VA. CODE ANN. § 2.2-4001 (2014) (definition of “guidance document”).

¹⁰ See *Jackson v. W.*, 14 Va. App. 391, 399 n.6 (1992).

¹¹ *Dep’t of Mines, Minerals & Energy v. May Bros., Inc.*, 11 Va. App. 115, 119 (1990).

¹² VA. RETIREMENT SYSTEM, *Employer Request for Forfeiture of Member Benefits* (VRS-180), available at <http://www.varetire.org/pdf/forms/vrs-180.pdf>.

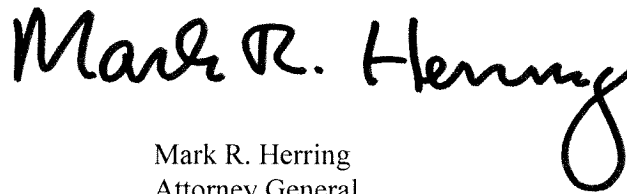
Once the determination becomes final,¹³ the statute provides no explicit timeframe for notifying the VRS Board. Rather, employers and the Board are instructed to comply with the statute “as soon as practicable.”¹⁴ A misinterpretation of statute does not waive the employer’s obligation to notify the Board of its final determination. Thus, the County must complete and transmit Form VRS-180 (Rev. 12/15) to the VRS Board notwithstanding a prior decision to decline to do so.

Conclusion

Accordingly, it is my conclusion that an employer does not have discretion under § 51.1-124.13 of the *Code of Virginia* and Form VRS-180 (Rev. 12/15) regarding whether or not to file Form VRS-180 to initiate forfeiture of VRS benefits once it has determined that an employee was convicted of a felony associated with the performance of his job duties. This conclusion does not change despite the language found on the prior Form VRS-180 (Rev. 12/11), seemingly making such a filing discretionary, because the statutory language in § 51.1-124.13 clearly mandates the forfeiture of all benefits awarded under Title 51. Finally, § 51.1-124.13 mandates that an employer, who relied on the permissive language of Form VRS-180 (Rev. 12/11) rather than the plain wording of the statute, notify the VRS Board of its final determination that an employee was convicted of a felony that “arose from misconduct occurring on or after July 1, 2011, in any position in which the person was a member covered for retirement purposes under any retirement system administered by the Board.”¹⁵

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink that reads "Mark R. Herring". The signature is written in a cursive, flowing style. The first name "Mark" is written with a capital 'M' and a period. The last name "Herring" is written with a capital 'H' and a period. The signature is positioned to the left of the typed name and title.

Mark R. Herring
Attorney General

¹³ Section 51.1-124.13(A).

¹⁴ Section 51.1-124.13(C).

¹⁵ Section 51.1-124.13(A).